UNITED STATES SENATE

SELECT COMMITTEE ON INTELLIGENCE

December 16, 1987

STATEMENT OF THE HONORABLE CLARK M. CLIFFORD

Chairman Boren, Vice Chairman Cohen, and members of the Committee:

I am pleased to appear before you today to offer my views on the subject of covert activities, and in particular your current efforts to improve the procedures by which such activities are approved by the President and made known to the Congress. This is a subject of great significance to our nation's foreign policy and our system of government. It is also, as we have recently seen, a subject of serious potential abuse. Therefore, the efforts of the Committee are both timely and vital.

In the last year or so, we have witnessed the recurrence of an all too frequent problem: covert activities that get out of control embarrass the nation and undermine our credibility and our capability to exercise world leadership. Moreover, this problem is getting worse, the costs are getting higher, and the damage is getting greater. For this reason, I say that, unless we can control covert activities once and for all, we may wish to abandon them.

While pleased to be with you today, I must confess to some frustration -- not at the Committee's efforts, but at the recurring need for such efforts. I can recall some twelve years ago testifying before the Select Committee to Study Governmental Operations with respect to Intelligence Activities -- the Church Committee -- regarding the gross abuses in covert activities that were the concern of that committee. In my testimony in 1975, I said:

> The lack of proper controls has resulted in a freewheeling course of conduct on the part of persons within the intelligence community that has led to spectacular failures and much unfortunate publicity. A new approach is obviously needed, for it is unthinkable that we can continue to commit the egregious errors that have caused such consternation to our friends and such delight to our enemies.

The Church Committee helped enact the 1980 Intelligence Oversight Act, and this certainly was a step forward. But today we know that it was not enough. Sadly, my words from 1975 are all too pertinent today.

My recollection also goes back fourteen years before the Church Committee came into existence. In 1961, after the attempted invasion of Cuba at the Bay of Pigs, President Kennedy re-constituted the Foreign Intelligence Advisory Board -- on which I then served for seven years -- in order to study the severe breakdown in intelligence gathering and decisionmaking that led to that activity, and in order to recommend measures to avoid its repetition. It is my opinion

that the so-called Iran-contra affair was more damaging to the nation's credibility and leadership than the Bay of Pigs incident.

Indeed, my recollection goes back sixteen years before the Bay of Pigs incident, when President Truman asked me to study the idea of establishing a peacetime intelligence agency. This led to the enactment of the National Security Act in 1947. Since that time, we have seen an egregious deviation from the original conception of how that act was supposed to function.

Covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy. And with these activities have come repeated instances of embarrassing failure -- where the goals of the operations themselves were not fulfilled and unforeseen setbacks occurred instead. I believe that on balance covert activities have harmed this country more than they have helped us. Certainly efforts to control these activities, to keep them within their intended scope and purpose, have failed. For this reason, the work of this Committee is essential.

We have reached the point now where we must reassess the very idea of conducting covert activities. If we are to continue with them and gain any benefit from them, we must find a way to keep them consistent with the principles and institutions of the Constitution and our foreign policy. If

we determine that this cannot be done, then again I say we are better off without covert activities entirely than with them out of control.

In 1946, those of us assigned the task of drafting the National Security Act were dealing with a new subject. This nation had not had a peacetime intelligence capability and had not regularly conducted covert activities. Soviet aggression in Europe and elsewhere at that time caused sufficient concern to justify new and bold actions. But at the same time there was concern that our nation not resort to the tactics of our enemies in our effort to resist them.

In preparing the National Security Act, we thus proceeded cautiously, sensitive to the experimental and risky nature of the enterprise on which we were embarked. Accordingly, it was decided that the Act should contain a carefully-worded "catch-all" clause to provide for unforeseen contingencies. Section 102(d)(5) provides that the CIA shall:

> perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.

The "other functions" that the CIA was to perform were not specified, but we did expect at that time that they would include covert activities. These activities were intended to be separate and distinct from the normal activities of the CIA, and they were intended to be restricted in scope and purpose. The catch-all clause was crafted to contain

significant limiting language: "affecting the national security."

As the Committee knows, the National Security Act of 1947 and its catch-all clause remain the only statutory authorization for covert activities. Moreover, the legislation that you are considering does not propose to alter the limiting language of the catch-all clause, but rather aims to enforce it better.

On this score, it bears emphasizing that it was by act of Congress that the CIA was established and exists today; it was by act of Congress that covert activities were authorized and continue to occur. This is so because our Constitution confers on Congress the power to make the laws, and the President is charged with taking care that the laws are faithfully executed according to the intent of Congress.

In my judgment, the Constitution clearly provides to Congress an important role in foreign policy, and this role includes the process of overseeing covert activities. It is part of the system of checks and balances among the separate branches of government. And we should remember that the oversight process does not give the Congress a veto, but only a voice.

Over the last year or so, the cost that covert activities can inflict on our system of government has been clear. Whatever the specific actions or individual responsibility,

the sale of arms to Iran and the diversion of profits from those sales to the contras in Nicaragua caused severe damage to our government and the institution of the Presidency. The President's credibility suffered drastically and with it the integrity of the nation's foreign policy.

One of the principal shortcomings of the Iran-contra affair was the failure of the President to notify the intelligence committees of the government's activities. The oversight process could have served a significant, salutary purpose: giving the President the benefit of the wisdom of those who are not beholden to him, but beholden like him directly to the people, and prepared to speak frankly to him based on their wide, varied experience. Had the President taken advantage of notifying Congress, he and the country may well have avoided tremendous embarrassment and loss of credibility.

The Iran-contra affair presents this Committee and the country with a crucial question: should the laws governing covert activities be changed.

To answer this question, we first might examine the attitude of President Reagan. In his letter to the Committee of August 7, 1987, the President said that the current laws are adequate and that any changes could occur by executive order. I strongly disagree.

In the Iran-contra affair, the President displayed an attitude that is antithetical to the oversight process. You

will recall that the President signed a finding that explicitly instructed the Director of the CIA not to notify the Congress of the activity. For ten months, the Director and others involved abided by this instruction. In fact, the President finally notified the Congress only after the activity had become public knowledge. Much later, after the Congress had begun its inquiry, the President in his letter to the Committee supported the concept of notifying the intelligence committees but insisted upon two exceptions. These exceptions would relieve the President of the notification requirement in "cases of extreme emergency" and "exceptional circumstances." To permit these two exceptions would make any notification requirement meaningless.

Further evidence of the Administration's attitude is the Justice Department's December 1986 memorandum supporting the President's position in delaying notification for ten months. The memorandum offered the novel theory that the President may determine what is timely notice based on the sensitivity of the covert activity. According to this theory, the President would never have to inform Congress of a particularly sensitive activity. This theory clearly would undermine the whole concept of the duty of the President to keep the Congress informed.

Moreover, we find that this continues to be the legal theory of the Justice Department. Last week in testimony

before this Committee, a Department representative made the following statement:

> There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President.

In other words, it is the attitude of the Administration that, whatever laws exist, the President may interpret them as he chooses. This is not the way that I understand our Constitution is supposed to work. The President's attitude must not prevail, or else recent misfortunes may well recur. So, my answer to the question confronting us today is that the laws governing the oversight process must be changed. And the changes must be specific, direct, and without exception.

I wish to lend my full support to S. 1721, the Cohen/Boren bill. This bill meets the need for change that exists in the important area of notification to the Congress. The bill would require the President to sign a written finding, setting forth the particulars of a covert activity, within 48 hours of approving it. The bill would require the President to provide the intelligence committees with the finding within the same period of time, and while the President could limit notification to the so-called Group of Eight, he would have to explain why he was doing so. The

President would also be required to give notice of any significant changes in any covert activity. Finally, the bill would prohibit findings that were inconsistent with U.S. law or purported to be retroactive.

These are all welcome and worthwhile changes in the oversight process. In my view, however, they are not enough. Tightening of the procedures will do some good, but past efforts of the Church Committee and others have demonstrated that we need to do more. In order to be effective, the new legislation should also contain sanctions that would penalize any failure to notify the Congress within the statutory period.

Therefore, I would like to propose for the Committee's consideration a provision to be added to S. 1721 that would automatically terminate and prohibit the expenditure of funds for any covert activity with respect to which the President had failed to follow the oversight process. This provision would go beyond the ban on funding of unauthorized activities in the Cohen/Boren bill, because it would require the President, within the statutory period, to notify the intelligence committees, as well as sign a finding. Furthermore, according to my proposal, any government officer or employee who knowingly and willfully violated or conspired to violate the prohibition against the expenditure of funds for such a covert activity would face criminal penalties.

In my view, there is no excuse for failure to notify the Congress according to the law, and there should be no exception to the sanction against violating such law. The purpose of this legislation is not to assume good faith but to ensure good government.

For many years the U.S. has offered leadership to the world because of its character as a nation and its devotion to freedom and the liberty of man.

We have great economic power.

We have unparalleled military power. But our standing in the world community rests mainly upon the confidence and trust that other nations have in us.

We do not hold the free world together at gunpoint.

It is mutual trust that binds us. And the vital element of that trust is our credibility.

Unfortunately, our credibility has been grieviously damaged this past year in many parts of the world.

It is incumbent upon all who are in positions of authority to take the necessary steps toward restoring our former position. This legislation is a splendid move in this direction, and will be of vital importance in reducing the possibility of another similar disaster.

I thank you.